

STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

FORMAL COMPLAINT NO. 78

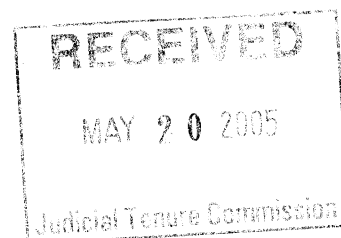
HON. DANA FORTINBERRY
Judge, 52nd District Court
Clarkston, MI 48346

Thomas W. Cranmer (P25252)
Matthew F. Leitman (P48999)
Attorneys for Respondent
Miller, Canfield, Paddock and Stone, P.L.C.
840 West Long Lake Road, Suite 200
Troy, Michigan 48098-6358
Telephone: (248) 267-3294

VERIFIED ANSWER OF RESPONDENT JUDGE DANA FORTINBERRY

Judge Dana Fortinberry, by her attorneys, Thomas W. Cranmer and Matthew F. Leitman, of the law firm of Miller Canfield Paddock & Stone, P.L.C., for her Verified Answer to the Complaint filed against her by the Michigan Judicial Tenure Commission, says as follows:

1. Judge Fortinberry admits only that since January 1, 2003, she has been a judge of the 52nd District Court, 2nd Division, in the City of Clarkston, Oakland County, Michigan.
2. Admitted.
3. Judge Fortinberry admits only that Robert Kostin is an attorney, that he is married to Kelley Kostin, and that he was married to Judie Kostin. Judge Fortinberry lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations.
4. Admitted.



COUNT I

5. Admitted. In further answer, Judge Fortinberry says that the letter was written by her to a person who was her friend. Judge Fortinberry did not intend that the letter would become public.

6. Admitted.

7. Judge Fortinberry denies the allegations as untrue.

8. a. Admitted.

b. Admitted.

c. Admitted.

d. Admitted.

e. Judge Fortinberry denies the allegations as untrue. Judge Fortinberry admits only that she stated that a neighbor stated that Kelley Ott moved into Bob Kostin's house less than a month after Judie Kostin's death.

9. As to the representations she admits making, Judge Fortinberry admits only that she did not undertake to independently verify the truth of the representations. In further answer, Judge Fortinberry says that given the circumstances under which she learned the information relayed in the representations she admits making, Judge Fortinberry had absolutely no reason to disbelieve, or question the truth of, the representations. Judge Fortinberry learned of the representations from a law enforcement officer and a fellow member of the Bar. Notably, it now appears that Robert Kostin himself has confirmed the accuracy of at least two of the representations. A police report prepared on or about September 18, 1989, contains statements attributed to Robert Kostin in which Mr. Kostin admitted that he was having an extra-marital affair with a "clerk for Judge Mester" and that Judie Kostin was aware of his extra-marital affair prior to her death.

10. See response to the allegations in paragraph 9 above.

11. Judge Fortinberry admits only that she had been told that the death was a suicide and that she has no first-hand knowledge that the investigation had reached an incorrect result.

12. Judge Fortinberry lacks information or knowledge sufficient to form a belief as to the truth of the allegations that her statement that Chief Stephens and Bob Kostin were friends and neighbors was inaccurate, and she denies the remaining allegations as untrue.

13. Judge Fortinberry lacks information or knowledge sufficient to form a belief as to the truth of the allegations that her statement that the police file was sealed was inaccurate, and she denies the remaining allegations as untrue.

14. Judge Fortinberry admits only that she stated that the facts presented in her letter raised questions about the moral fiber of Mr. Kostin and Kelley Ott Kostin, and she denies the remaining allegations as untrue. In further answer, Judge Fortinberry says that questions about the moral fiber of Mr. Kostin and Kelley Ott Kostin arose from the fact that they had an adulterous sexual relationship and apparently began to cohabit shortly after the tragic death of Mr. Kostin's wife.

15. Judge Fortinberry denies the allegations as untrue.

COUNT II

16. Admitted.

17. Judge Fortinberry denies the allegations as untrue. In further answer, Judge Fortinberry says that former Magistrate Colleen Murphy has stated in a sworn affidavit that she was seated with Judge Fortinberry on the night in question, that she was able to hear everything that was discussed, and that she did not hear Judge Fortinberry say that Robert Kostin had killed his wife and gotten away with it.

18. Judge Fortinberry admits only that she said that Kelley Kostin was Robert Kostin's girlfriend before his death, and she denies the remaining allegations as untrue. In further answer, Judge Fortinberry says that former Magistrate Colleen Murphy has stated in a sworn affidavit that she was seated with Judge Fortinberry on the night in question, that she was able to hear everything that was discussed, and that she did not hear Judge Fortinberry say that Robert Kostin was getting away with murder.

19. Judge Fortinberry denies the allegations as untrue. In further answer, Judge Fortinberry says that former Magistrate Colleen Murphy has stated in a sworn affidavit that she was seated with Judge Fortinberry on the night in question, that she was able to hear everything that was discussed, and that she did not hear Judge Fortinberry say that the police had not conducted a proper investigation.

20. As set forth above in paragraphs 17-20, Judge Fortinberry denies as untrue that she made the statements attributed to her. Thus, there would have been no basis for her to attempt to verify the facts underlying those alleged statements.

21. Judge Fortinberry admits only that she made no report to any police agency concerning any matter related to Judie Kostin, Robert Kostin, or Kelley Ott Kostin. As noted above, she denies as untrue that she made the representations attributed to her.

22. Judge Fortinberry denies the allegations as untrue.

Additional Statements and Defenses

23. In order to comply with the requirement of MCR 9.209(B)(2) that she provide a full and fair disclosure of all facts and circumstances pertaining to the allegations against her, Judge Fortinberry hereby incorporates her written answers (plus exhibits) dated September 18,

2004, to the questions posed by Casimer J. Swastek in his letter to Judge Fortinberry dated September 14, 2004.

24. Judge Fortinberry affirmatively asserts as a defense that the First Amendment to the United States Constitution and Article I, Section 5 of the Michigan Constitution of 1963 bar the Complaint against her because the complaint seeks to punish Judge Fortinberry for engaging in political and/or protected speech.

25. Judge Fortinberry affirmatively asserts as a defense that the Supreme Court's decision in *In Re Chmura*, 464 Mich. 58 (2001) bars the Complaint against her because, among other things, (a) the Complaint does not sufficiently allege that Judge Fortinberry's purported representations were false, (b) the Judicial Tenure Commission cannot sufficiently establish the falsity of the purported representations, and/or (c) the purported statements on which the Complaint is based are, in large part, statements of opinion.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: _____

Thomas W. Cranmer (P25252)

Matthew F. Leitman (48999)

Attorneys for Respondent

840 West Long Lake Road, Suite 200

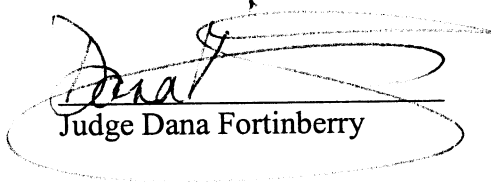
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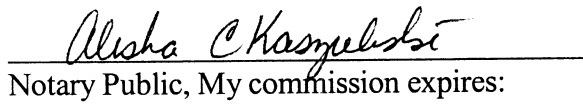
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

VERIFICATION

I declare that the statements above are true to the best of my information, knowledge, and belief.


Judge Dana Fortinberry

Subscribed and sworn to before me, a
Notary Public, in and for the said County
and State, this 19 day of May, 2005.


Notary Public, My commission expires:

ALISHA C. KASZUBSKI
NOTARY PUBLIC, STATE OF MI
COUNTY OF OAKLAND
MY COMMISSION EXPIRES Nov 2, 2011